

**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR**

J U D G M E N T

D.B. CENTRAL EXCISE APPEAL NO.59/2006
(Union of India Vs. M/s Hindustan Zinc Ltd. & Anr.)

D.B. CENTRAL EXCISE APPEAL UNDER
SECTION 35 G OF THE CENTRAL
EXCISE ACT, 1944.

Date of Judgment : 09th August, 2007

P R E S E N T

HON'BLE MR. JUSTICE P.B.MAJMUDAR
HON'BLE MR. JUSTICE DEO NARAYAN THANVI

Mr. V.K.Mathur for the appellant..
Mr. Dinesh Mehta for the respondent.

BY THE COURT : (PER MAJMUDAR,J.)

REPORTABLE

This Central Excise Appeal is directed against the order passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi in Appeal No. E/4417/04-NB/SM, by which, the Tribunal has allowed the appeal filed by the respondent No.1 with consequential relief. The respondent No.1 is engaged in manufacture of Zinc ingots. During scrutiny of the records of the

respondent-assessee No.1, it was found that the respondent-assessee No.1 had wrongly taken Cenvat Credit of Rs.99,050/- during the period between 1.4.2002 to 28.2.2003 on "cement" treating it as input. A show cause notice was issued to the respondent-assessee as to why the said Cenvat Credit should not be disallowed. The respondent-assessee No.1 was also asked to show cause as to why interest and penalty should not be recovered from him. The respondent-assessee No.1 replied the said show cause notice on various grounds.

The Assistant Commissioner, Central Excise Division, Udaipur vide his order dated 30th August, 2003 confirmed the demand of Rs.99,050/- and also ordered for recovery of interest under Section 11AB of the Act, 1944. A penalty of Rs.25,000/- was also imposed on the respondent-assessee under Rule 13 of the Cenvat Credit Rules, 2002.

Being aggrieved by the said order, the respondent-assessee No.1 preferred an appeal before the Commissioner (Appeals), Customs and Central Excise, Jaipur-II. The Appellate Authority by its order dated 4th June, 2004 dismissed the appeal by confirming the order so far as it relates to demand. However, the Appellate Authority reduced the penalty to Rs.10,000/- from Rs.25,000/-. The respondent-assessee No.1

carried the matter further by way of appeal before the Customs, Excise and Service Tax Appellate Tribunal, New Delhi. The Tribunal vide its final order dated 01st June, 2005 allowed the said appeal, against which, the appellant has filed this appeal under Section 35G(1) of the Central Excise Act, 1944. At the time of admitting this appeal, the following substantial question of law has been formulated by the Court:

“Whether the learned Tribunal is right as per law in allowing the cenvat credit on “cement” as inputs which was used in the construction of foundation for machineries or as a building material, in terms of Explanation II of Rule 2(g) of the Rules, 2002 considering the fact that the foundation does not qualify as “capital goods” in terms of Rule 2(b) of the Cenvat Credit Rules, 2002?”

Learned counsel Mr. Vineet Mathur appearing on behalf of appellant submitted that so far as cement is concerned, it is a building material and, therefore, Cenvat Credit on the same as inputs cannot be allowed. It is submitted by learned counsel Mr. Mathur that cement can be used for construction of foundation or as a building material, in terms of Explanation II of Rule 2(g) of the Rules, 2002 considering the fact that the foundation does not qualify as capital goods as per Rule 2(b) of the Cenvat Credit Rules, 2002.

Learned counsel Mr. Dinesh Mehta on the other hand submitted that without use of cement, the mines cannot be operated and, therefore, cement falls under the category of capital goods. Learned counsel Mr. Mehta further submitted that in the instant case, cement was used in the foundation of the casting machine in the Zinc Electrolysis plant as well as in the foundation of the Zinc purification Pachuka and in the foundation of other machineries installed in the Leaching Plant, Roaster and Acid Plant and that the cement has been used in relation to the manufacture of final product.

We have heard learned counsel for the parties. While deciding D.B. Central Excise Appeal No.75/2006 (Union of India Vs. M/s. Hindustan Zinc Ltd.), we have held that cement being a building material used for the purpose of building construction cannot be said to be an input used for manufacturing of final product and that no Cenvat Credit is available so far as cement is concerned. It is submitted by learned counsel Mr. Mehta that cement plays an important role in connection with the manufacturing of final product. In our view, it cannot be said that without cement manufacturing of final product is not possible. In our view, cement used as building material for laying foundation cannot be directly or indirectly said to be an

integral part in connection with manufacture of final product. In our view, the First Appellate Authority therefore has rightly found that in the facts and circumstances of the case, cement cannot be considered as inputs. In the instant case, it is not in dispute that cement has been used in the construction of foundation for machineries and used as a building material. The foundation made of cement in our view does not fall under the category of capital goods as defined under Rule 2(b) of the Cenvat Credit Rules, 2002. The item in question i.e. cement also cannot be considered as inputs as per the definition of Explanation II of Rule 2(g) of the Rules, 2002. In D.B. Central Excise Appeal No.75/2006, we have taken a view that no Cenvat Credit is available so far as the cement is concerned. In our view, the foundation made of cement does not fall under the category of capital goods as per the definition clause and since the cement was used in the construction of foundation, it cannot be said to be eligible capital goods in terms of Rule 2(b) of the Cenvat Credit Rules, 2002 and the cement cannot be said to be inputs in terms of Explanation II of Rule 2(g) of the Rules, 2002.

Considering the aforesaid aspect of the matter, in our view, the Tribunal has erred in allowing the appeal filed by the respondent-assessee. In our view, the Tribunal has committed substantial error of law in allowing the appeal of the respondent-

assessee by holding that the assessee is entitled for getting benefit of Cenvat Credit on cement. In our view, the foundation cannot be described as capital goods as per Rule 2(b) of the Cenvat Credit Rules, 2002, and it cannot be said that the same is used in connection with manufacturing of goods, which are further used for the manufacture of the ultimate product.

Accordingly, this appeal is allowed. The order of the Tribunal is set aside and the order of the Commissioner (Appeals), Customs and Central Excise, Jaipur-II is restored with no order as to costs.

(DEO NARAYAN THANVI),J.

(P.B.MAJMUDAR),J.

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